Frank J. Greco
4450 Lakeshore Rd
Manistee, MI 49660

231 723 4844
frankgreco@charter.net

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Corbin R. Davis
Clerk, Michigan Supreme Court
PO Box 30052
Lansing, MI, 48909

RE: ADM File 2010-19 - Proposed Revisions of MCR Subchapter 7.100 - Appeals to Circuit Court

Dear Mr. Davis:

This is a comment on the ADM file referenced above. Note that while I am Chair of the State Bar of Michigan Civil Procedure and Courts Committee, I am submitting this comment individually and not on behalf of the Civil Procedure and Courts Committee, which has not taken a position on these proposals.

The published proposals constitute a wholesale revision of Subchapter 7.100. In the general revision of the court rules resulting in the adoption of the Michigan Court Rules, effective March 1, 1985, there were significant changes in the Subchapters 7.200 and 7.300, governing procedure in the Court of Appeals and the Supreme Court, but the rules governing appeals to circuit court were not substantially changed. The proposed revisions of subchapter 7.100 are a welcome addition.

The committee that developed these proposals has done a fine job of giving some order to the procedure for appeals to circuit court. I have several thoughts about some individual rules, set forth below. In addition, I assume that the Court's staff will carefully review the language of the rules. Rules committees appropriately focus on the substance of the subjects they are addressing, with less attention to the details of the language. These rules could benefit from close review.

My specific suggestions are as follows:

1. MCR 7.105(B)(5). This rule covers what must be filed with an application for leave to appeal. It says that certain transcripts be filed "unless waived by stipulation of the parties or court order". It might be worth specifying whether it is the trial court or the circuit (i.e. appellate) court to which the appellant is to make the request to excuse the transcript requirement. I suspect that it should be the trial court. There is no good way to make the request of the circuit court, since the application for leave to appeal would be the first document filed in there.

2. MCR 7.108(B)(2)(a) and (4)(c). This rule deals with stays and bonds. There seems to be some inconsistency between these two subrules. Subrule (2) says that when of the appeal bond is filed "the judgment or order shall automatically be stayed". But then subrule (4)(c) says that if no timely objections to the bond are filed, the court is to "enter the order staying enforcement of the judgment or order". Is the idea that the automatic stay is only effective until the time for filing objections passes? I think that would surprise a lot of folks.

3. MCR 7.113(A)(1). This rule says the following about involuntary dismissals:

> (A) Involuntary Dismissal.
>
> (1) *Dismissal.* If the appellant fails to pursue the appeal in conformity with the court rules, the circuit court will notify the parties that the appeal shall be dismissed unless the deficiency is remedied within 14 days.
>
> (2) Reinstatement. Within 14 days after the date of the dismissal order, the appellant may move for reinstatement by showing mistake, inadvertence, or excusable neglect.

As you can see, the rule doesn't say anything about the court actually entering a dismissal order or giving notice of it. This leaves out a good bit of the detail in the corresponding Court of Appeals rule, MCR 7.217, on which the proposal is based:

> (A) Dismissal. If the appellant, or the plaintiff in an original action under MCR 7.206, fails to order a transcript, file a brief, or comply with court rules, the clerk will notify the parties that the appeal may be dismissed for want of prosecution unless the deficiency is remedied within 21 days after the date of the clerk's notice of deficiency. If the deficiency is not remedied within that time, the chief judge or another designated judge may dismiss the appeal for want of prosecution.

> (B) Notice. A copy of an order dismissing an appeal for want of prosecution will be sent to the parties and the court or tribunal from which the appeal originated.

I think the details regarding entry of the order and providing notice of the order are useful. For example, what if the appellant gets the notice of a deficiency, and then submits something the appellant thinks is sufficient to cure, but the court doesn't think the new submission is good enough. Notice of the dismissal would be important at that point.

4. MCR 7.114. This is the rule on Taxation of Costs and Fees. It seems odd to put that rule ahead of the rule on oral argument and decision, MCR 7.115. [By the way, the catch-line of 7.115 should include "Oral Argument"].

5. MCR 7.120(B)(2)(a). This subrule covers the form of the claim of appeal in licensing appeals under the vehicle code. It says:

> (a) Claim of Appeal – Form. The claim of appeal shall conform to the requirements of MCR 7.104(C)(1), ***except*** that the party aggrieved by the Secretary of State's determination is the appellant. [Emphasis added.]

It doesn't make sense to say "except". The party aggrieved is always the appellant. And this rule doesn't say who the appellee is. Most of the provisions regarding agency appeals specify the appellee, as that can sometimes be unclear. See proposed MCR 7.118(D)(1); 7.119(B)(2)(a); 7.121(B)(2)(a); 7.122(C)(1)(b).

6. MCR 7.122(C)(1)(b). This rule talks about designation of parties in appeals in zoning ordinance determinations. It says:

> (1) Claim of Appeal – Form. The claim of appeal shall conform to the requirements of MCR 7.104(C)(1), except that:
>
> (a) the party aggrieved by the determination shall be designated the appellant; and
>
> (b) the city, village, township or county under whose ordinance the determination was made shall be designated the "appellee," except that when a city, village, township, county, or an officer or entity authorized to appeal on its behalf, appeals a determination as an aggrieved party, then the appellee

> shall be designated as the board, commission, or other entity that made the determination.

When the municipality appeals, the party that prevailed before the board should also be named as an appellee.

7. MCR 7.122. A number of other provisions of this rule regarding zoning ordinance appeals should be looked at carefully.

There several provisions in this rule should be adjusted to include references to the "the board, commission, or other entity that made the determination." That would make sense in subrule (A)(2), as there would be situations in which an action against the decision-making entity would be appropriate. And in subrule (C)(5) the entity that made the decision should be served with the claim of appeal.

Subrule (B) sets the time for filing an appeal at 30 days after certification of the minutes of the decision. Maybe that should be 30 days after notice of the certification is given. Local agencies are sometimes a bit casual about giving notice of their decisions.

Subrule (C)(4) requires that the claim of appeal be accompanied by a copy of the order or minutes of the officer or entity from which the appeal is taken. There might be situations in which there is no such document to attach. Perhaps that possibility should be covered by allowing a statement that there is no such document to be provided.

I appreciate the opportunity to comment on the proposals. If the Court has any questions about these suggestions, feel free to contact me.

Frank Greco